

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

GARY SILVA,

Petitioner,

v.

RUSSELL, et al.,

Respondents.

Case No. 3:20-cv-00270-RCJ-WGC

ORDER

I. Introduction

This is a habeas corpus matter under 28 U.S.C. § 2254. Multiple motions are before the court. The court grants petitioner Gary Silva's motion for leave to file an amended petition (ECF No. 29). The granting of that motion makes all previously filed motions—respondents' motion to dismiss (ECF No. 9), Silva's motion for transcripts (ECF No. 20), respondents' motion to strike the amended petition (ECF No. 25), and respondents' motion to strike the opposition to the motion to dismiss (ECF No. 26)—moot. Finally, the court grants respondents' motion to strike an unauthorized surreply filed by Silva (ECF No. 37).

II. Procedural Background

A. Proceedings in State Courts

On April 11, 2013, Silva was charged in the Henderson Justice Court with one count of aggravated stalking. Ex. 3 (ECF No. 10-3). Then, on April 17, 2013, Silva was charged in the

1 North Las Vegas Justice Court with another count of aggravated stalking. Ex. 4 (ECF No. 10-4).
2 Silva agreed to plead guilty to one count of aggravated stalking in the state district court. Ex. 20
3 (ECF No. 10-20). On May 7, 2014, the state district court sentenced Silva to prison for a
4 minimum term of 6 years and a maximum term of 15 years, suspended the sentence, and placed
5 Silva on probation for 5 years. Ex. 16 (ECF No. 10-16 at 13).

6 Silva violated the terms of his probation twice. The first time, a probation violation report
7 was filed on September 23, 2015. Ex. 24 (sealed). The state district court reinstated probation
8 but required Silva to spend 90 days in jail. Ex. 26 (ECF No. 10-26).

9 Silva's second violation occurred between February 9, 2017, and March 15, 2017. It
10 resulted in Silva being charged in the Las Vegas Justice Court with misdemeanor stalking; the
11 complaint was filed on May 22, 2017. Ex. 29 (ECF No. 10-29). Silva retained James Leavitt to
12 represent him. The Las Vegas Justice Court held a bench trial on the misdemeanor stalking
13 charge on July 20, 2017, and found Silva guilty. Ex. 39 (ECF No. 10-39). Silva did not appeal.

14 Before that trial, on July 6, 2017, a probation violation report was filed in the state district
15 court in the aggravated stalking case. Ex. 38 (sealed). Silva retained James Leavitt to represent
16 him in these proceedings, too. The state district court held a hearing on July 27, 2017; it revoked
17 Silva's probation and imposed the original prison sentence. Ex. 41 (ECF No. 11-1). The state
18 district court filed an order revoking probation and a second amended judgment of conviction on
19 August 7, 2017. Ex. 42 (ECF No. 11-2). Silva did not appeal.

20 On July 26, 2018, Silva filed a counseled post-conviction habeas corpus petition in the
21 state district court. Ex. 48 (ECF No. 11-8). His sole claim for relief was that Leavitt provided
22 ineffective assistance because Leavitt did not file a notice of appeal even after Silva instructed
23 him to file one. Id. In a hearing on September 13, 2018, the state district court requested the
24 parties to brief the underlying issue whether Silva was constitutionally entitled to counsel at the
25 probation-revocation hearing and thus whether Silva had a right to effective assistance of that
26 counsel. Ex. 53 (ECF No. 11-13). After receiving those briefs, the state district court determined
27 that under Gagnon v. Scarpelli, 411 U.S. 778, 790-91 (1973), Silva did not have a constitutional
28 right to counsel in the probation-revocation proceedings, and thus Leavitt could not have

1 provided constitutionally ineffective assistance in not filing a notice of appeal. Ex. 58 (ECF No.
2 11-18). Silva appealed, and the Nevada Court of Appeals affirmed. Ex. 77 (ECF No. 11-37).

3 **B. Relevant Proceedings in Federal Court**

4 Silva dispatched his federal habeas corpus petition to this court on May 5, 2020. ECF No.
5 5 at 1. Grounds 1 and 2 contained allegations regarding the lack of appeals in both the conviction
6 for aggravated stalking and the conviction for misdemeanor stalking. The court concluded that
7 Silva actually was challenging only the conviction for aggravated stalking, and the court stated
8 that respondents would not need to respond to any perceived claim that Silva was deprived of a
9 direct appeal in his misdemeanor stalking case. ECF No. 4 at 2-3. The court also dismissed
10 ground 3 of the petition because it was a claim of ineffective assistance of post-conviction
11 counsel, and Silva had no constitutional right to post-conviction counsel. ECF No. 4 at 3.

12 Respondents filed a motion to dismiss. ECF No. 9. Silva responded first with a motion
13 for transcripts at the state's expense and to subpoena and transcribe phone records, which related
14 to the misdemeanor stalking conviction. ECF No. 20. Silva then filed a 101-page combined
15 amended petition, for which he did not seek leave of court to file, and opposition to the motion to
16 dismiss. ECF No. 23, ECF No. 24. Respondents responded to that document with a motion to
17 strike the amended petition and a motion to strike the opposition to the motion to dismiss. ECF
18 No. 25, ECF No. 26. Silva then filed a motion for leave to file an amended petition, with a much
19 more concise 15-page proposed amended petition attached. ECF No. 29. On July 22, 2021, Silva
20 filed a surreply, unauthorized by LR 7-2(b), in support of his oppositions to the motions to strike.
21 ECF No. 36. Respondents then filed a motion to strike the surreply. ECF No. 37.

22 **III. Discussion**

23 **A. Motion for Leave to File Amended Petition**

24 Silva clarifies that he never intended to challenge the validity of the misdemeanor stalking
25 conviction, but that he only wanted to demonstrate a pattern of Leavitt failing to file notices of
26 appeal. ECF No. 29 at 2. Silva also notes that, in response to respondents' arguments in the
27 motion to dismiss that he did not allege what issues he wanted to raise on appeal, his other factual
28 allegations in ground 1 of the proposed amended petition illustrate what Leavitt knew at the time

1 and support his claim that Leavitt provided ineffective assistance by not filing a notice of appeal.
2 ECF No. 29 at 23. Furthermore, Silva has titled ground 1 of the proposed amended petition as a
3 violation of his right to effective assistance of appellate counsel or counsel on appeal. ECF No.
4 29-1 at 3. Based upon Silva's statements, the court concludes that ground 1 of the proposed
5 amended petition is only a claim that counsel provided ineffective assistance by not filing a notice
6 of appeal from the revocation of probation and the second amended judgment of conviction in the
7 aggravated stalking case. Of course, the underlying issue which the parties must address first,
8 and which the state courts addressed, is whether Silva had a constitutional right to counsel, and
9 thus a constitutional right to effective assistance of counsel, in those probation-revocation
10 proceedings. See Scarpelli, 411 U.S. at 790-91. Because Silva's statements and ground 1 of the
11 proposed amended petition clear up the confusion generated by the initial petition, the court
12 grants the motion for leave to file an amended petition.

13 The proposed amended petition contains five more grounds, numbered 2 through 6. All of
14 them are without merit on their faces, and the court dismisses them under Rule 4 of the Rules
15 Governing Section 2254 Cases in the United States District Courts.

16 Grounds 2 through 5 raise claims of error in the state post-conviction habeas corpus
17 proceedings. In ground 2, Silva alleges that the Nevada Court of Appeals erred in affirming the
18 state district court's denial of his post-conviction habeas corpus petition. In ground 3, Silva
19 alleges that the state courts erred in their rulings that Silva did not have a constitutional right to
20 counsel, and thus did not have a constitutional right to effective assistance of counsel, in the
21 probation-revocation proceedings. In ground 4, Silva alleges that the district attorney who
22 prepared the state district court's decision did not appear in the hearings in that court. In ground
23 5, Silva alleges that the state district court and the Nevada Court of Appeals erred in their
24 application of Scarpelli. All of these are claims of error in the state post-conviction proceedings,
25 and such errors are not addressable in federal habeas corpus. Franzen v. Brinkman, 877 F.2d 26,
26 26 (9th Cir. 1989). The court dismisses grounds 2 through 5 because they lack merit.

27 In ground 6, Silva alleges that the state court's rulings are contrary to, or an unreasonable
28 application of, clearly established federal law. What Silva actually is alleging is the standard of

1 review that this court uses in determining whether to grant relief, under 28 U.S.C. § 2254(d)(1).
2 It is not a claim for relief by itself. Ground 6 is without merit, and the court dismisses it.

3 To avoid confusion over which amended petition is the operative petition, the court will
4 direct the clerk to file the proposed amended petition as a second amended petition.

5 **B. Motion to Dismiss**

6 The granting of the motion for leave to file an amended petition has mooted most of
7 respondents' concerns in their motion to dismiss. Respondents first argued that Silva was
8 challenging his conviction for misdemeanor stalking even though the court had stated that Silva
9 could not challenge both convictions in the same petition. ECF No. 9 at 6, 8. Silva now has
10 clarified that he is not making any such challenge. Second, respondents argued that Silva had not
11 exhausted his claim that counsel was ineffective during the revocation proceedings because
12 counsel did not bring certain issues to light. ECF No. 9 at 6-7. Silva now has clarified that these
13 were issues that he wanted counsel to raise on appeal, in support of his claim that counsel
14 deprived him of his appeal. Third, respondents argued that Silva's claim that Leavitt deprived
15 him of his appeal was conclusory. ECF No. 9 at 8-9. Silva's proposed amended petition contains
16 allegations of issues that he wanted Leavitt to raise on appeal.

17 Respondents' fourth argument is that Silva did not have a constitutional right to counsel in
18 his probation-revocation proceedings. ECF No. 9 at 7-8 (citing Scarpelli, 411 U.S. at 790-91).
19 This is an issue that the Nevada Court of Appeals decided on the merits. Ex. 77 at 3-4 (ECF No.
20 11-37 at 4-5). Consequently, this is an issue that this court must decide on the merits after the
21 parties have filed an answer to the petition and a reply.

22 For these reasons, the court denies the motion to dismiss.

23 **C. Motion for Transcripts at the State's Expense**

24 Silva wants to obtain the transcript of his misdemeanor-stalking trial. He argues that the
25 state courts did not consider this transcript in their determinations that he did not have a
26 constitutional right to counsel in the probation-revocation proceedings. Silva also wants to obtain
27 the recording of a phone call, and the transcription of that phone call, between him and a parole
28

1 and probation officer. Silva alleges in that phone call that the officer was sympathetic to Silva's
2 situation.

3 These items were not in the state-court record for Silva's post-conviction habeas corpus
4 petition. This court's review of the decision of the Nevada Court of Appeals is limited to the
5 record before that court in this case. Cullen v. Pinholster, 563 U.S. 170 (2011). Even if the court
6 granted Silva's request, the court could not consider these transcripts in determining whether the
7 state court's determination was contrary to or an unreasonable application of federal law. 28
8 U.S.C. § 2254(d)(1). The court denies this motion.

9 **D. Motions to Strike**

10 Respondents ask the court to strike the amended petition (ECF No. 23) and the response to
11 the motion to dismiss (ECF No. 24), which are actually the same document, because Silva first
12 did not obtain leave of the court to file an amended petition. ECF No. 25, ECF No. 26. These
13 motions are moot because the court is granting Silva's subsequently filed motion for leave to file
14 an amended petition and is filing a superseding amended petition.

15 Silva filed a surreply in support of his opposition to the above motions to strike. ECF No.
16 36. Silva may not file a surreply without prior leave of the court. LR 7-2(b). Respondents move
17 to strike the surreply. ECF No. 37. The court grants this motion.

18 **IV. Conclusion**

19 IT THEREFORE IS ORDERED that petitioner's motion for leave to file an amended
20 petition (ECF No. 29) is **GRANTED**. The clerk of the court is directed to file the proposed
21 amended petition, currently in the docket at ECF No. 29-1, as the second amended petition.

22 IT FURTHER IS ORDERED that respondents will have 60 days from the date of entry of
23 this order to file and serve an answer, which must comply with Rule 5 of the Rules Governing
24 Section 2254 Cases in the United States District Courts. Petitioner will have 30 days from the
25 date on which the answer is served to file a reply.

26 IT FURTHER IS ORDERED that respondents motion to dismiss (ECF No. 9) is
27 **DENIED**.

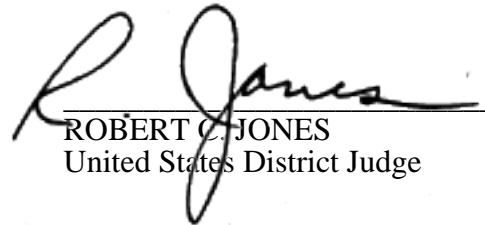
1 IT FURTHER IS ORDERED that petitioner's motion for transcripts at the state's expense
2 and to subpoena and transcribe phone records (ECF No. 20) is **DENIED**.

3 IT FURTHER IS ORDERED that respondents' motion to strike amended petition (ECF
4 No. 25) is **DENIED** as moot.

5 IT FURTHER IS ORDERED that respondents' motion to strike response (ECF No. 26) is
6 **DENIED** as moot.

7 IT FURTHER IS ORDERED that respondents' motion to strike (ECF No. 37) is
8 **GRANTED**. The clerk of the court is directed to strike petitioner's rebuttal (ECF No. 36).

9 DATED: September 29, 2021.


ROBERT C. JONES
United States District Judge